IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-57

CANADIAN ACE BREWING CO.,

Petitioner,

vs.

ANHEUSER-BUSCH, INCORPORATED,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner respectfully prays that a Writ of Certiorari issue to review the Unpublished Per Curiam Order of the United States Court of Appeals for the Seventh Circuit which was entered in this proceeding (Docket No. 78-1668) on March 6, 1979.

OPINION BELOW

The Per Curiam Order of the Court of Appeals has not been published. A copy appears in the Appendix (at pp. A1-A2).

JURISDICTION

The Per Curiam Order of the Court of Appeals was entered on March 6, 1979. A timely Petition for Rehearing with Suggestions for Rehearing *En Banc* was denied on April 18, 1979. A copy of the denial appears in the Appendix (at p. A23). This petition was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

1. Whether Respondent will be permitted by this Court, to frustrate the application of the federal antitrust laws, by totally destroying Petitioner's business, and inducing it to forbear from bringing this private federal antitrust action, for more than two years after Petitioner's dissolution, as a result of Respondent's admitted acts of fraudulent concealment, fraudulent inducement and affirmative fraudulent misrepresentations; or whether Respondent will be prohibited by this Court, from taking advantage of its own admitted wrongdoing, in a court of justice.

2. Whether the District and Circuit Courts erred in refusing to apply the doctrine of equitable estoppel, established by this Court in *Glus* v. *Brooklyn Eastern Terminal*, 359 U. S. 231, 3 L. Ed. 2d 770, 79 S. Ct. 760 (1959),[1] to the Illinois statutory time-filing limitation period, after Petitioner's corporate dissolution, provided for in *Ill. Rev. Stat.* ch. 32, § 157.94 (1933),[2] as amended (hereinafter "§ 94"), in this private antitrust action, wherein Respondent admitted to having violated the federal antitrust laws, and to having totally destroyed Petitioner's business, in an industry which originally had 756 breweries in 1934 (after the repeal of prohibition), and presently has 43 breweries.

3. Whether the District and Circuit Courts erred, in refusing to apply the established doctrine of equitable estoppel in this private federal antitrust action, to the Illinois statutory time-filing limitation period, after Petitioner's corporate dissolution, although recognizing its application to statutes of limitation and statutes of creation.

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1. A copy appears in the Appendix (at pp. A11-A15).

2. The capacity of a corporation to sue is exclusively a matter of state law—Rule 17(b) F. R. C. P.

STATUTE INVOLVED

Section 94 of the Illinois Business Corporation Act of 1933, as amended, ch. 32, § 157.94, provides that:

> The dissolution of a corporation either (1) by the issuance of a certificate of dissolution by the Secretary of State, or (2) by the decree of a court of equity when the court has not liquidated the assets and business of the corporation, or (3) by expiration of its period of duration, shall not take away or impair any remedy available to or against such corporation, its directors, or shareholders, for any right or claim existing, or any liability incurred, prior to such dissolution if action or other proceeding thereon is commenced within two years after the date of such dissolution. Any such action or proceeding by or against the corporation may be prosecuted or defended by the corporation in its corporate name.

STATEMENT OF THE CASE

Petitioner filed this action in the United States District Court for the Northern District of Illinois, on November 11, 1977, alleging violations by Respondent of the federal antitrust laws, which ultimately destroyed Petitioner's business. Petitioner additionally alleged the following:

1. That it owned and operated a brewery located in Chicago, Illinois, and was a stockholder of the Respondent brewery, which owed Petitioner fiduciary obligations;

2. That Respondent made direct payments of cash to retailers and their agents and furnished other things of value (i.e., goods and services) to retailers, in violation of the federal antitrust laws;

3. That Respondent reimbursed its nationwide network of nondefendant distributors, who made cash payments and provided other things of value to retailers, in violation of the federal antitrust laws;

4. That Respondent concealed such illegal payments by means of preparing and causing recipients thereof to prepare sham and fraudulent contracts, invoices, agreements and other documents, in violation of the federal antitrust laws;

5. That Respondent directed the payment of cash through third parties, including its outside maintenance company, in order to conceal the true nature and source of the payments, in violation of the federal antitrust laws;

6. That Petitioner was dissolved as a corporation on December 6, 1972;

7. That it filed this suit in the United States District Court on November 10, 1977;

8. *That Petitioner's dissolution was proximately and directly procured by the admitted affirmative acts of fraudulent conceal-*

ment, fraudulent inducement and fraudulent misrepresentations of Respondent; and

9. *That Petitioner's forbearance from commencing this action, within the applicable two-year statutory time-filing limitations period after dissolution, provided in § 94, was proximately and directly caused by the admitted affirmative acts of fraudulent concealment, fraudulent inducement and fraudulent misrepresentations by Respondent;*

10(a) That on May 12, 1977, the Securities and Exchange Commission filed "A COMPLAINT FOR INJUNCTION AND OTHER RELIEF" against Respondent, regarding its acts of fraudulent concealment, fraudulent inducement and fraudulent misrepresentations (Copy attached as Exhibit "A" to Complaint).

(b) That on May 19, 1977, Respondent entered into a "CONSENT AND UNDERTAKING OF ANHEUSER-BUSCH, INC." (Copy attached as Exhibit "B" to Complaint).

(c) That on May 20, 1977, a "FINAL JUDGMENT OF PERMANENT INJUNCTION" was entered against Respondent (Copy attached as Exhibit "C" to Complaint).

Respondent filed a motion to dismiss the Complaint in this suit, pursuant to Rule 12(b)(6) F. R. C. P. on the ground that Petitioner, a dissolved corporation, lacked capacity to sue Respondent when this action was brought.[3] On April 10, 1978, the District Court granted Respondent's motion and entered a final judgment dismissing the Complaint, reported at 448 F. Supp. 769 (N. D. Ill. 1978). A copy appears in the Appendix (at pp. A3-A10). The District Court ruled that the admitted fraudulent conduct of Respondent cannot have any bearing on the court's

3. Since this appeal is taken from a final order of the District Court granting Respondent's motion to dismiss under Rule 12(b)(6) F. R. C. P., Petitioner's well pleaded allegations regarding Respondent's conduct of fraudulent concealment, fraudulent inducement and fraudulent misrepresentations, in the Complaint, are to be treated as true (*Miree* v. *DeKalb County*, 433 U. S. 25, 53 L. Ed. 2d 557, 97 S. Ct. 2490 (1977) (n. 2)).

disposition of Respondent's motion to dismiss, inasmuch as § 94 was absolute and unequivocal. Petitioner appealed to The Seventh Circuit.

On March 6, 1979, The Seventh Circuit affirmed, in an abbreviatory "Unpublished Per Curiam's Order" stating:

> The sole issue in this appeal is whether the district court correctly held that the plaintiff corporation, seeking to maintain an action alleging antitrust violations more than two years after it had been dissolved as a corporation, could do so on the ground that the Illinois statute of survival, Ill. Rev. Stat. ch. 32, § 157.94, was tolled due to defendant's alleged acts of fraudulent concealment or fraudulent inducement.
>
> For the reasons given in the district court's opinion, 448 F. Supp. 769 (N. D. Ill. 1978), which we adopted as our own, we agree with the court's decision. Therefore the judgment is affirmed.

On March 20, 1979, Petitioner filed a Petition for Rehearing with Suggestions for Rehearing *En Banc*, contending that the issue is not that set forth in the Per Curiam Order, but whether

> [d]efendant's admitted acts of fraudulent concealment equitably estop defendant from raising the two-year limitation period contained in § 94 of the Illinois Corporation Act as a defense, due to principles of equity jurisprudence and public policy.

as stated in Petitioner's Brief at page 7, and its Reply Brief at page 3.

Petitioner further contended that the Seventh Circuit's Order in the instant case conflicted directly with the decision, and the established law, of this Court in *Glus, supra,* and the decision of the Seventh Circuit in *Bomba* v. *W. L. Belvidere, Inc.*, 579 F. 2d 1067 (1978).[4]

4. A copy appears in the Appendix (at pp. A16-A21). *Bomba* was decided by the Seventh Circuit, *after* Canadian Ace was decided by the District Court.

On March 26, 1979, Respondent was directed by the Seventh Circuit, to file an answer "limited to the issue of equitable estoppel in light of *Bomba* v. *Belvidere, Inc.*, 579, F. 2d 1067 (7th Cir. 1978)," in accordance with Rule 49(a), F. R. A. P.[5] On April 5, 1979, Respondent filed its Answer. On April 18, 1979, the Petition for Rehearing and Suggestions for Rehearing En Banc was denied.[6] This Petition was filed within 90 days of that date.

REASONS FOR GRANTING THE WRIT

This is a case of first impression. It concerns the failure of the District and Circuit Courts to apply the doctrine of equitable estoppel, established by this court in *Glus,* to a statutory time-filing limitation period, after a corporate dissolution (such as currently is in effect in all 50 states), in a private federal antitrust case; thus, permitting Respondent to frustrate the application of the antitrust laws of this country, and to take advantage of its own admitted wrongdoing, in a court of justice.

5. A copy appears in the Appendix (at p. A22).
6. A copy appears in the Appendix (at p. A23).

ARGUMENT

I.

THE FEDERAL ANTITRUST LAWS ARE THE ECONOMIC BULWARK OF A DEMOCRATIC SOCIETY

The federal antitrust laws are the economic bulwark of a democratic society. Congress was impelled to pass the Sherman Act because of the intense public hostility against vast business combinations which, by 1890, were dominating much of the economic, political, and social life of the United States. *United States* v. *E. I. DuPont de Nemours & Co.*, 351 U. S. 377, 76 S. Ct. 994, 100 L. Ed. 1264 (1956). In addition, Congress was concerned with the growing concentration of economic power in the hands of the few and the rapidly diminishing freedom of economic opportunity for the small businessman. *United States* v. *South Eastern Underwriters Ass'n.*, 322 U. S. 533, 64 S. Ct. 1162, 88 L. Ed. 1440, rehearing denied 323 U. S. 811 (1944). At 554-555 this Court stated:

> A general application of the Act to all combinations of business and capital organized to suppress commercial competition is in harmony with the spirit and impulses of the times which gave it birth. "Trusts" and "monopolies" were the terror of the period. Their power to fix prices, to restrict production, to crush small independent traders and to concentrate large power in the few to the detriment of the many, were but some of the numerous evils ascribed to them. The organized opponents of trusts [and monopolies] aimed at the complete destruction of all business combinations which possessed potential power, or had the intent to destroy competition in whatever the people needed or wanted." (Footnotes omitted.)

There were 756 breweries in 1934. There are only 43 today.

II.

RESPONDENT SHOULD NOT BE PERMITTED TO FRUSTRATE THE FEDERAL ANTITRUST LAWS AND TO TAKE ADVANTAGE OF ITS OWN ADMITTED ACTS OF FRAUDULENT CONDUCT, IN A COURT OF JUSTICE

Pomeroy, in his TREATISE OF EQUITY JURISDICTION, Fifth Edition, Volume III, § 802, at page 180, referring to the doctrine of Equitable Estoppel, stated:

> [1] Its *foundation* is justice and good conscience;
>
> [2] Its *object* is to prevent the unconscientious and inequitable assertion of enforcement of claims or rights which might have existed or been enforceable by other rules of the law, unless prevented by the estoppel;
>
> [3] Its *practical effect* is, from motives of equity and fair dealing, to create and vest opposing rights in the party who obtains the benefit of the estoppel (emphasis added).

Glus and *Bomba* directly control the case of Petitioner—*Canadian Ace*.

1(a) In *Glus* and *Bomba*, the statutory time-filing limitation period to bring suit was declared to be *absolute* and *unequivocal;*

(b) In *Canadian Ace*, like *Glus* and *Bomba*, the District Court's Memorandum Opinion, adopted by the Circuit's Panel, declared the Illinois two-year time filing statute, after dissolution (§ 94), to be *absolute* and *unequivocal*. This statute is characterized by the Illinois courts as "not strictly a statute of limitation but is a conditional limitation upon plaintiff's right of action" (*Sarelas* v. *McCue & Co.*, 291 Ill. App. 540, 10 N. E. 2d 700, 702 (1937));

2(a) In *Glus* and *Bomba*, plaintiffs filed their action after the statutory time-filing limitation period had expired;

(b) In *Canadian Ace*, like *Glus* and *Bomba*, Plaintiff filed its action after the statutory time-filing limitation period had expired, following dissolution;

3(a) In *Glus* and *Bomba*, defendants, by making false representations to the plaintiffs, lulled them into a false sense of security, causing them to forbear from commencing their actions until the statutory time-filing limitation period had expired;

(b) In *Canadian Ace*, like *Glus* and *Bomba*, Respondent, by its admitted affirmative acts of fraudulent concealment, fraudulent inducement and fraudulent misrepresentations, falsely lulled Petitioner to forbear from commencing this action until the statutory two-year time-filing limitation period, after dissolution (§ 94), had expired;

4(a) In *Bomba*, plaintiff relied on *Glus*, as its authority for the application of the doctrine of equitable estoppel;

(b) In *Canadian Ace*, like *Bomba*, Petitioner relied on *Glus*, as its authority, for the application of the doctrine of equitable estoppel;

5(a) In *Glus* and *Bomba*, the District Court ruled that the explicit language in the statute foreclosed application of the doctrine of equitable estoppel. In *Glus*, the Second Circuit affirmed the District Court; however, this Court reversed. In *Bomba*, the Seventh Circuit reversed the District Court;

(b) In *Canadian Ace*, the District Court's Memorandum Opinion, adopted by the Seventh Circuit's Panel, ruled, in effect, that the explicit language in the statute foreclosed application of the doctrine of equitable estoppel. However, the Seventh Circuit in affirming the District Court, refused to follow the principle of equitable estoppel, declared in *Glus* and *Bomba;*

6(a) In *Bomba*, the Seventh Circuit, adopting *Glus* as its authority, ruled that *although the absolute and unequivocal language in the statute presented an insurmountable barrier to tolling of the statutory time-filing limitation period to bring suit,*

this language did not foreclose the application of the separate and distinct doctrine of equitable estoppel;

(b) In *Canadian Ace,* the District Court's Memorandum Opinion, adopted by the Seventh Circuit's Panel, ruled, in effect, that the two-year statutory time-filing limitation period (§ 94) to bring suit, was an insurmountable barrier to the tolling of the statute, and this language *did also foreclose* the application of the separate and distinct doctrine of equitable estoppel. This ruling is a *reversal* of the principle of equitable estoppel declared by this Court in *Glus,* and by the Seventh Circuit in *Bomba;*

7(a) In *Bomba,* the Seventh Circuit, adopting *Glus* as its authority, ruled:

> Equitable estoppel . . . is not concerned with the running and suspension of the limitations period, but rather comes into play only after the limitations period has run and addresses itself to the circumstances in which a party will be estopped from asserting the statute of limitations as a defense to an admittedly untimely action because his conduct has induced another into forbearing suit within the applicable limitations period. *Its* [equitable estoppel's] *application is wholly independent of the limitations period itself and takes its life not from the language of the statute, but from the equitable principle that no man will be permitted to profit from his own wrongdoing in a court of justice. Thus, because equitable estoppel operates directly on the defendant without abrogating the running of the limitations period as provided by statute, it might apply no matter how unequivocally the applicable limitations period is expressed* (emphasis added at p. A19).

This was a reaffirmation of *Pomeroy, supra.*

(b) In *Canadian Ace,* the District Court's Memorandum Opinion, adopted by the Seventh Circuit's Panel, contrary to the ruling in *Glus* and *Bomba,* declared, in effect, the following:

1. That tolling *is* the issue;
2. That equitable estoppel *does not* apply;

3. That equitable estoppel *is not* wholly independent of the limitation period, and the equitable principle that no man will be permitted to profit from his own wrongdoing in a court of justice, *is not* applicable; and
4. That a party *will not* be estopped from asserting the limitation period to bring suit, as a defense to an admittedly untimely action, although its fraudulent conduct has induced another into forbearing suit within the applicable statutory time-filing limitation period.

This ruling is a reversal of the applicability of the doctrine of equitable estoppel as declared in *Bomba,* relying on *Glus,* wherein it is stated:

1. That tolling is *not* the issue;
2. That equitable estoppel *does* come into play after the limitation period has run;
3. That equitable estoppel *is* wholly independent of the limitation period, and the equitable principle that no man will be permitted to profit from his own wrongdoing in a court of justice, *is applicable;* and
4. That a party *will be* estopped from asserting the limitation period to bring suit, as a defense to an admittedly untimely action, because his conduct has induced another into forbearing suit within the applicable statutory time-filing limitation period (§ 94).

8(a) In *Bomba,* the Seventh Circuit adopted the principles of conscience and justice in *Glus,* stating:

> The principle that no man may take advantage of his own wrongdoing was so deeply rooted in and integral to our jurisprudence that it should be implied in the interstices of every federal cause of action absent some affirmative indication that Congress expressly intended to exclude the application of equitable estoppel (at p. A20).

(b) In *Canadian Ace,* the District Court's Memorandum Opinion, adopted by the Seventh Circuit's Panel, abandoned the

principle of *Glus* and *Bomba*, that no man may take advantage of his own wrongdoing, and condoned the Respondent's admitted acts of fraudulent concealment, fraudulent inducement and fraudulent misrepresentations, "in a court of justice." Although *Glus* and *Bomba* address themselves to federal statutes, the same rule must of necessity apply to any court of justice—be it a federal or state court, involving a federal or state statute. Equitable estoppel is not a special principle of justice applicable to federal statutes only. Equitable estoppel is a principle of conscience and justice. In *Ruthfield* v. *Louisville Fuel Co., Inc.*, 312 Ill. App. 415, 38 N. E. 2d 832 (1942), at pages 838-9 the court stated:

> The courts afford adequate relief against fraud regardless of the cloak under which its operations are concealed.
> . . . *We do no know of any interpretation that has been placed on the Corporation Act [§ 94] which has the effect of permitting individuals to perpetrate frauds without being brought to justice.*

See also *Fitzpatrick* v. *Pitcairn*, 371 Ill. 203, 20 N. E. 2d 74 (1939).

This Court in *Glus*, and the Seventh Circuit in *Bomba*, stated that the principle forbiding any man from taking advantage of his own wrongdoing is so deeply rooted in and integral to our jurisprudence that it must be applied in the interstices of every statute, absent some affirmative indication that it was expressly intended to exclude the application of equitable estoppel.

III.

RESPONDENT SHOULD NOT BE PERMITTED TO FLAUNT THE FEDERAL ANTITRUST LAWS

The public policy of this country requires that the doctrine of equitable estoppel be applied to § 94 so as to prohibit Respondent from taking advantage of its own admitted wrongdoing in a

court of justice. If the Seventh Circuit's ruling is not reversed, the lesson to a potential corporation predator is clear—merely violate the federal antitrust laws but do not just injure your competitor, for it may survive to have its day in court. Rather, totally destroy your competitor, and induce it to refrain from bringing suit, through fraudulent concealment and affirmative acts of misrepresentation, until after the expiration of the statutory time-filing limitation period, following the forced corporate dissolution of your competitor.

A court of equity should not be impotent and powerless in the face of Respondent's brazen and arrogant admission of its fraudulent conduct in this federal antitrust suit. Thus, equitable estoppel, as a doctrine of conscience and justice, should apply to the instant case.

Where the dissolution of an Illinois plaintiff corporation is procured by Respondent's fraud, the Respondent should not be allowed to rely on § 157.94 as an impregnable shield (similar to the old and long rejected "corporate-veil" theory) behind which it can reap, harvest and enjoy the ill-gotten fruits of its admitted fraud, in a private antitrust suit.

CONCLUSION

Justice has been denied Petitioner by the District Court, in its refusal to follow the established law declared by this Court in *Glus, supra.* Justice has been denied Petitioner by the Seventh Circuit Court of Appeals, in its refusal to follow the established law declared by this Court in *Glus, supra,* and by the Seventh Circuit in *Bomba, supra.* Petitioner prays that this Court will remedy these injustices. Thus, a Writ of Certiorari should issue to the Seventh Circuit Court of Appeals, the judgment should be reversed, and this cause remanded to the District Court for trial on the factual issues alleged in the Complaint, regarding Respondent's affirmative acts of fraudulent concealment, fraudulent inducement and fraudulent misrepresentation and Respondent's violation of the federal antitrust laws.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Argued February 20, 1979
March 6, 1979.

Before

HON. ROBERT A. SPRECHER, *Circuit Judge*
HON. PHILIP W. TONE, *Circuit Judge*
HON. HARLINGTON WOOD, JR., *Circuit Judge*

CANADIAN ACE BREWING CO.,
Plaintiff-Appellant,

No. 78-1668 *vs.*

ANHEUSER-BUSCH, INCORPORATED,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 77 C 4198

Hubert L. Will,
Judge.

ORDER

The sole issue in this appeal is whether the district court correctly held that the plaintiff corporation, seeking to maintain an action alleging antitrust violations more than two years after it had been dissolved as a corporation, could do so on the ground that the Illinois statute of survival, Ill. Rev. Stat. ch. 32,

§ 147.94, was tolled due to defendant's alleged acts of fraudulent concealment or fraudulent inducement.

For the reasons given in the district court's opinion, 448 F.Supp. 769 (N.D. Ill. 1978), which we adopt as our own, we agree with the court's decision. Therefore, the judgment is affirmed.

UNITED STATES DISTRICT COURT,
N. D. Illinois, E. D.

April 10, 1978.

CANADIAN ACE BREWING CO.,
Plaintiff,

vs.

ANHEUSER-BUSCH, INCORPORATED,
Defendant.

No. 77 C 4198.

Allen H. Schultz, Jay L. Schultz, Schultz & Schultz, Chicago, Ill., for plaintiff.

C. Frederick Leydig, Paul L. Ahern, Leydig, Voit, Osann, Mayer & Holt, Ltd., Chicago, Ill., Harold F. Baker, Terrence C. Sheehy, Peter E. Moll, Scott E. Flick, Howrey & Simon, Washington, D. C., for defendant.

MEMORANDUM OPINION

WILL, *District Judge.*

Canadian Ace Brewing Co. (Canadian Ace), a dissolved Illinois corporation which had been engaged in brewing and distributing malt beverages, brings this action against Anheuser-Busch, Inc. pursuant to Section 4 of the Clayton Act, 15 U.S.C. § 15, alleging that defendant has engaged in monopolization, price fixing and price discrimination in the malt beverage industry. Before us at this time are defendant's motion to dismiss or to strike. For the reasons herein stated, we grant the motion to dismiss.

I.

Canadian Ace alleges, without specification, that, some time prior to 1967, Anheuser Busch, Inc., the largest manufacturer and seller of malt beverages in the United States, began and has continued to monopolize the malt beverage trade, has entered into contracts, combinations and conspiracies to fix the prices of its malt beverages, and has discriminated in price between different wholesaler purchasers of its malt beverages. As a result of these alleged actions, Canadian Ace claims that it was forced out of business. It seek damages in a trebled total of $45,000,000.

Defendant moves to dismiss on the ground that Canadian Ace lacks capacity to bring this suit inasmuch as Illinois corporate law forbids dissolved corporations to sue or be sued after two years following the date of dissolution. Canadian Ace concedes the existence of this rule, but states that it was unaware of defendant's actions due to the latter's fraudulent concealment, which concealment, it contends, tolled the two-year survival statute prior to discovery of defendant's alleged conduct. Anheuser-Busch counters with a motion to strike the allegations in the complaint dealing with the alleged fraudulent concealment.

II.

On November 28, 1972, Canadian Ace filed with the Secretary of State of Illinois a statement of intent to dissolve, and, on December 6, 1972, following the filing of articles of dissolution, the Secretary of State issued a certificate of dissolution. Section 94 of the Illinois Business Corporation Act, Ill.Rev.Stat. ch. 32, § 157.94 provides:

> The dissolution of a corporation either (1) by the issuance of a certificate of dissolution by the Secretary of State, . . . shall not take away or impair any remedy available to or against such corporation, its directors, or shareholders, for any right or claim existing, or any liability incurred, prior to such dissolution if action or other

> proceeding thereon is commenced within two years after the date of such dissolution. Any such action or proceeding by or against the corporation may be prosecuted or defended by the corporation in its corporate name.

In the absence of any exceptional factors, therefore, as Canadian Ace's complaint was not filed until November 11, 1977, the suit would be barred by section 94.[1] Canadian Ace argues, however, that, as a matter of public policy, we should exercise our equitable powers and toll the two-year survival period due to Anheuser-Busch's alleged affirmative acts of fraudulent concealment. Plaintiff further asserts that this is a case of first impression and, in such circumstances, we should act in such a way as to uphold the federal claim for relief.

We begin with a few general observations on the question of corporate standing after dissolution. At common law, the dissolution of a corporation terminated its legal existence. It could neither sue nor be sued and even pending proceedings abated. See *2 Mod. Business Corp. Act. Ann.* § 105, ¶ 2 (2d ed. 1970). Ultimately, every jurisdiction adopted statutes allowing actions to be brought by or against dissolved corporations and preventing actions from abating on dissolution, whether voluntarily or involuntarily or because of charter expiration. Even when a statute continues the existence of a corporation for a certain period, however, it is generally held that the corporation becomes defunct upon the expiration of such period, and, in the absence of a provision to the contrary, no action can afterwards be brought by or against it and must be dismissed. 16A W. Fletcher, *Cyclopedia of the Law of Private Corporations* § 8144 (1962 Rev. Vol. by M. Wolf).

Plaintiff, in invoking the principle of "fraudulent concealment," attempts to apply to section 94 the tolling principle

1. Fed. R. Civ. P. 17(b) provides that the capacity of a corporation to sue or be sued is determined by the law of the state under which the corporation was organized. Our consideration of Canadian Ace's capacity, therefore, is governed by Illinois law.

applied to statutes of limitations. Although Canadian Ace discusses the difference in "procedural" and "substantive" (*i.e.*, jurisdictional) statutes of limitations, noting that fraudulent concealment was originally considered applicable only to the former but is increasingly being applied to the latter, the Illinois courts have made clear that section 94 is a

> survival statute rather than a statute of limitations. And this is the characterization given it by courts of this State. The Appellate Court for the First District, discussing Section 79 of the General Corporation Act of 1919, the predecessor to the present section 94, stated: "There is no dispute that by the common law doctrine of the status of a corporation after its dissolution for any cause, the corporation has no legal existence, and the real estate held by the dissolved corporation reverts to the grantors or donors, and the personal property escheats to the king, and that no right of action can be maintained to enforce a claim against a defunct corporation. In the United States however, this common law doctrine has been so modified that the property of a dissolved corporation is to be used for the benefit of the creditors and stockholders after dissolution, and generally, by a saving clause, stockholders or creditors may maintain an action for that purpose, and in order to maintain an action it must be filed within the time fixed for such purpose. In the instant case, by saving clause, complainant was granted statutory right to maintain an action of the character before this court. * * *" *People v. Parker*, 30 Ill.2d 486, 197 N.E.2d 30, 31 (1964) (citations omitted)

It would appear that any application of the fraudulent concealment doctrine must be made by analogy to the statute of limitations situation and involve invocation of this Court's equitable powers. We conclude, however, that under the various judicial constructions of section 94, we have no authority to set aside its provisions.

Canadian Ace in its brief cites the case of *Hodgson v. Lodge 851, Int'l Ass'n of Mach. & Aerospace Wkrs.*, 454 F.2d 545 (7th Cir. 1971), which states in a footnote, 459 F.2d at 548 n. 3: "Moreover, it is clear that all statutory periods can be tolled in the case of fraudulent concealment. *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 22 L.Ed. 636 [1874]. *Exploration Co. v. United States*, 247 U.S. 435 [38 S.Ct. 571, 62 L.Ed. 1200] [1918]."

To avoid any misconception about this statement, it should be noted that the case dealt solely with statutes of limitations and the Seventh Circuit was concerned with the substantive-procedural statute of limitations distinction. We do not think, therefore, that this rather generalized statement made in the context of statutes of limitations is applicable here. As the court in *Litts v. Refrigerated Transport Co.*, 375 F.Supp. 675, 678 (M.D.Pa.1973) found:

> Moreover, it must be emphasized that the corporate extension statute is not a statute of limitations. . . . For the purposes of this case, the importance of that statement seems to lie in this: A statute of limitations begins to run upon the accrual of a party's cause of action, while the corporate statute starts running upon the dissolution of the corporation.

The purposes of a statute of limitations and a survival statute are also dissimilar. The former "were enacted to prevent frauds; to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evidence which would show that such rights never existed, or had been satisfied, transferred or extinguished, if they ever did exist. To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to protect fraud the means by which it is made successful and secure." *Bailey v. Glover, supra*, 88 U.S. (21 Wall.) at 349.

Corporate survival statutes, however, were enacted both to aid in the winding up process of a corporation following its dissolution and also to prevent the abuse whereby a corporation would dissolve in order to escape creditors.

We additionally note that, although the doctrine of fraudulent concealment with respect to statutes of limitations has its foundations at common law, the Illinois legislature found it necessary to enact a specific statutory provision on the subject in the limitations chapter. Ill.Rev.Stat. ch. 83, § 23. No parallel enactment exists in the Business Corporation Act with respect to the survival statute.

The cases are legion for the proposition that the right of a corporation to exist beyond its date of dissolution is purely one of statutory origin. In *Ruthfield* v. *Louisville Fuel Co.*, 312 Ill.App. 415, 38 N.E.2d 832, 837 (1942), the court, construing section 94, stated:

> It is the law of this state that the right to maintain an action against a defunct corporation is wholly controlled by statute, and that such right must be exercised within the time fixed by the legislature.

The United States Supreme Court, in a discussion of the predecessor of the present Illinois statute and similar provisions, stated:

> The decisions of this court are all to the effect that a private corporation in this country can exist only under the express law of the state sovereignty by which it was created. Its dissolution puts an end to its existence, the result of which may be likened to the death of a natural person. There must be some statutory authority for the prolongation of its life, even for litigation purposes. *Chicago Title and Trust Co. v. Forty-One Thirty-Six Wilcox Bldg. Corp.*, 302 U.S. 120, 124-25, 58 S.Ct. 125, 127, 82 L.Ed. 147 (1937).

In *O'Neill v. Continental Illinois Co.*, 341 Ill.App. 119, 93 N.E.2d 160, 168 (1950), plaintiff alleged that the dissolved corporate defendant had made "false and untrue" statements in its articles of dissolution by stating that it had discharged all of its debts when it had, in fact, failed to deliver to plaintiff $350,000 in United States Treasury Certificates. The court stated:

> In our judgment the language of Section 94 is clear and unambiguous. Under that section any right of claim existing on behalf of a corporation or any liability incurred by a corporation prior to its dissolution may be enforced if the action is commenced "within two years after the date of such dissolution." We have neither the power or desire to nullify the plain and wholesome provisions of Section 94.

Finally, we note that the Illinois courts have held Section 94 to be applicable even in suits in equity. *Koepke v. First National Bank of DeKalb*, 5 Ill.App.3d 799, 284 N.E.2d 671 (1972). One Illinois court has discussed as dictum the possibility that a dissolved corporation might be equitably estopped from *denying* its existence, as when it has engaged in a series of intentional misrepresentations about its activties leading an unwary potential creditor to believe that the corporation was in existence.[2] There is no question here, however, of anyone being misled as to a corporation's existence. What plaintiff in effect contends is that it possessed an asset in the nature of a claim against the defendant of which it was unaware during the period of its existence including the two-year survival period. Now from the grave, so to speak, it seeks to pursue that claim. We find no basis for concluding that we have the power to raise it from the dead to enable it to do so.

We find, therefore, that the principles of fraudulent concealment have no application to this action brought by a corporation

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2, See *Ruthfield* v. *Louisville Fuel Co., supra,* 38 N. E. 2d at 838-39.

dissolved nearly five years prior to the filing of the complaint. Accordingly, we grant Anheuser-Busch's motion to dismiss.[3]

An appropriate order will enter.

3. Our decision on the motion to dismiss eliminates the necessity of ruling on defendant's alternate motion to strike. We emphasize that our holding in this action relates solely to the capacity of Canadian Ace to bring suit and we express no opinion as to the ability of the stockholders of the dissolved corporation to bring actions in their individual capacities.

MICHAEL GLUS,

Petitioner,

vs.

BROOKLYN EASTERN DISTRICT TERMINAL

359 US 231, 3 L ed 2d 770, 79 S Ct 760

[No. 446]

Argued March 2, 1959. Decided April 20, 1959.

OPINION OF THE COURT

Mr. Justice Black delivered the opinion of the Court.

In 1957 petitioner brought this action under the Federal Employers' Liability Act to recover damages for an industrial disease he allegedly contracted in 1952 while working for respondent.[1] Although § 6 of the Act provides that "No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued," petitioner claimed that respondent was estopped from raising this limitation because it had induced the delay by representing to petitioner that he had seven years in which to sue.[2] Respondent contended that while estoppel often prevents defendants from relying on statutes of limitations it can have no such effect in FELA cases for there the time limitation is an integral part of a new cause of action and that cause is irretrievably lost at the end of the statutory period. The District Court, after discussing two

1. 35 Stat. 65, as amended, 45 USC §§ 51-60.

2. Paragraph 9 of petitioner's complaint states, "Subsequent thereto defendant's agents, servants and employees fraudulently or unintentionally misstated to plaintiff that he had seven years within which to bring an action against said defendant as a result of his industrial disease and in reliance thereon plaintiff withheld suit until the present time."

lines of cases "in sharp conflict," one supporting respondent[3] and one supporting petitioner,[4] concluded with apparent reluctance that it was required by prior decisions of the Court of Appeals for the Second Circuit to dismiss petitioner's suit.[5] The Court of Appeals affirmed, saying "For the reasons well stated by [the District Court] we should not attempt to retrace our footsteps now, but may well await resolution of the conflict by the Supreme Court." 253 F2d 957, 958. Since the question is important and recurring we granted certiorari. 358 US 814, 3 L ed 2d 57, 79 S Ct 76.

To decide the case we need look no further than the maxim that no man may take advantage of his own wrong. Deeply rooted in our jurisprudence this principal has been applied in many diverse classes of cases by both law and equity courts[6] and has frequently been employed to bar inequitable reliance on statutes of limitations.[7] In Schroeder v Young, 161 US 334, 40

3. American R. Co. v Coronas (CA1 Puerto Rico) 230 F 545, LRA1916E 1095, 12 NCCA 49; Bell v Wabash R. Co. (CA8 Mo) 58 F2d 569; Damiano v Pennsylvania R. Co. (CA3 Pa) 161 F2d 534; Ahern v. South Buffalo R. Co. 303 NY 545, 563, 104 NE2d 898, 908, aff'd on other grounds 344 US 367. 97 L ed 395, 73 S Ct 340.

4. Scarborough v Atlantic Coast Line R. Co. (CA4 Va) 178 F2d 253, 15 ALR2d 491, 190 F2d 935, 202 F2d 84; Fravel v Pennsylvania R. Co. (DC Md) 104 F Supp 84; Toran v New York, N. H. & H. R. Co. (DC Mass) 108 F Supp 564.

5. The District Court noted, "The reasoning of [petitioner's] cases is not unpersuasive. But I feel that I am bound by the decisions of the Court of Appeals of this Circuit. . . ." 154 F Supp 863, 866.

6. See, e. g., The Arrogante Barcelones (US) 7 Wheat 496, 519, 5 L ed 507, 512; Sprigg v Bank of Mount Pleasant (US) 10 Pet 257, 264, 265, 9 L ed 416, 418, 419; Van Rensselaer v Kearney (US) 11 How 297, 322-329, 13 L ed 703, 713-716; Gregg v Von Phul (US) 1 Wall 274, 280, 281, 17 L ed 536, 537; Morgan v Chicago & A. R. Co. 96 US 716, 720-722, 24 L ed 743-745; Reynolds v United States, 98 US 145, 158-169, 25 L ed 244, 247, 248; Dickerson v Colgrove, 100 US 578, 25 L ed 618; Kirk v Hamilton, 102 US 68, 76-79, 26 L ed 79, 82, 83; Daniels v Tearney, 102 US 415, 420-422, 26 L ed 187-189.

7. See, e. g., Howard v West Jersey & S. R. Co. 102 NJ Eq 517, 141 A 755, affd on op below 104 NJ Eq 201, 144 A 919. See also

(Footnote continued on next page.)

L ed 721, 16 S Ct 512, this Court allowed a debtor to redeem property sold to satisfy a judgment, after the statutory time for redemption had expired although the statute granting the right to redeem also limited that right as to time.[8] The Court held that the purchasers could not rely on the limitation because one of them had told the debtor "that he would not be pushed, that the statutory time to redeem would not be insisted upon, and [the debtor] believed and relied upon such assurance." The Court pointed out that in "such circumstances the courts have held with great unanimity that the purchaser is estopped to insist upon the statutory period, notwithstanding the assurances were not in writing and were made without consideration, upon the ground that the debtor was lulled into a false security." 161 US, at 344.[9] As Mr. Justice Miller expressed it in Union Mut. L. Ins. Co. v Wilkinson (US) 13 Wall 222, 233, 20 L ed 617, 622, "The principle is that where one party has by his representations or his conduct induced the other party to a transaction to give him an advantage which it would be against equity and good conscience for him to assert, he would not in a court of justice be permitted to avail himself of that advantage. And although the cases to which this principle is to be applied are not as well defined as could be wished, the general doctrine is well

(Footnote continued from preceding page.)

Dawson, Estoppel and Statutes of Limitation, 34 Mich L Rev 1; cases collected in 77 ALR 1044; 130 ALR 8; 15 ALR2d 500; 24 ALR2d 1413.

8. Compare 2 Utah Comp Laws (1888), Tit IX, §§ 3442-3445 (derived from Act of Feb. 1870, Utah Laws 1870, p. 17, §§ 229-232) with 2 Utah Comp Laws (1888), Tit II, §§ 3129-3168. See also Act of Jan. 18, 1867, Utah Laws 1867, p. 32.

9. See also Graffam v Burgess, 117 US 180, 29 L ed 839, 6 S Ct 686, where a judgment debtor who had been deceived by his creditors was allowed to redeem land sold on execution even though the time limitation on redemptions had expired and despite a dissent which argued that it was "of the utmost importance . . . that the right thus granted should be strictly exercised according to the statute. For . . . the favor of allowing the debtor one year more to save his land . . . only adds to his obligation to exercise the right thus granted in strict accordance with its terms." Id. 117 US at 196.

understood and is applied by courts of law as well as equity where the technical advantage thus obtained is set up and relied on to defeat the ends of justice or establish a dishonest claim."

We have been shown nothing in the language or history of the Federal Employers' Liability Act to indicate that this principle of law, older than the country itself, was not to apply in suits arising under that statute.[10] Nor has counsel made any convincing arguments which might lead us to make an exception to the doctrine of estoppel in this case. To be sure language in some decisions of this Court can be taken as supporting such an exception.[11] But that language is in dicta and is neither binding nor persuasive. Accordingly, we hold that it was error to dismiss this case. Despite the delay in filing his suit petitioner is entitled to have his cause tried on the merits if he can prove that respondent's responsible agents, agents with some authority in the particular matter, conducted themselves in such a way that petitioner was justifiably misled into a good-faith belief that he could begin his action at any time within seven years after it had accrued.

It is no answer to say, as respondent does, that the representations alleged were of law and not of fact and therefore could not justifiably be relied on by petitioner. Whether they could or could not depends on who made them and the circumstances in

10. See Dickerson v Colgrove, 100 US 578, 582, 25 L ed 618, 620 (citing discussions of the doctrine by Coke and Littleton). See also Sprigg v Bank of Mt. Pleasant (US) 10 Pet 257, 265, 9 L ed 416, 419; Van Rensselaer v Kearney (US) 11 How 297, 322-325, 13 L ed 703, 713, 715.

11. See, e. g., A. J. Phillips Co. v. Grand Trunk W. R. Co., 236 US 662, 666-668, 59 L ed 774, 776, 777, 35 S Ct 444; Atlantic Coast Line R. Co. v Burnette, 239 US 199, 60 L ed 226, 36 S Ct 75, 17 NCCA 144; William Danzer & Co. v. Gulf & S. I. R. Co. 268 US 633, 637, 69 L ed 1126, 1129, 45 S Ct 612. But cf. The Harrisburg, 119 US 199, 214, 30 L ed 358, 362, 78 S Ct 140, "The liability and the remedy are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right. No question arises in this case as to the power of a court of admiralty to allow an equitable excuse for delay in suing, because no excuse of any kind has been shown."

which they were made. See Scarborough v Atlantic Coast Line R. Co. (CA 4 Va) 190 F2d 935. Such questions cannot be decided at this stage of the proceedings.

It may well be that petitioner's complaint as now drawn is too vague, but that is no ground for dismissing his action. Cf. Conley v Gibson, 355 US 41, 47, 48 L ed 2d 80, 85, 78 S Ct 99. His allegations are sufficient for the present. Whether petitioner can in fact make out a case calling for application of the doctrine of estoppel must await trial.

Reversed.

UNITED STATES COURT OF APPEALS,
Seventh Circuit.

Argued April 28, 1978.

Decided July 21, 1978.

Rehearing Denied Aug. 29, 1978.

ROBERT BOMBA and ANNAMARIE P. BOMBA,
Plaintiffs-Appellants,

vs.

W. L. BELVIDERE, INC., a general partner doing business as Candlewick Lakes Associates, a partnership,
Defendant-Appellee.

No. 78-1045.

Before FAIRCHILD, *Chief Judge,* MARKEY, *Chief Judge,* United States Court of Customs and Patent Appeals,* and BAUER, *Circuit Judge.*

BAUER, *Circuit Judge.*

Plaintiffs bring this appeal from the district court's grant of defendant's motion for summary judgment in a civil action brought under the Interstate Land Sales Full Disclosure Act, 15 U.S.C. §§ 1701-17. Plaintiffs contend that the defendant developer violated 15 U.S.C. § 1703(a)(1) by selling them two lots without having filed a statement of record in accordance with 15 U.S.C. § 1706 and without having provided plaintiffs with a printed property report as required by 15 U.S.C. § 1707. The defendant answered, *inter alia,* that plaintiffs' action was barred by the statute of limitations specified in 15 U.S.C. § 1711. Plaintiffs then replied that the defendant was estopped by its

* The Hon. Howard T. Markey, Chief Judge of the United States Court of Customs and Patent Appeals is sitting by designation.

conduct from relying on the statute of limitations. The district court disagreed, granted defendant's motion for summary judgment on the ground of the statute of limitations, and dismissed plaintiffs' cause of action. We reverse and remand the case for further proceedings.

I.

Plaintiffs' complaint alleges that the defendant sold them two lots of land on August 4, 1973 without having effective statements of record and without providing plaintiffs with property reports for each lot as required by the Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1703(a)(1). On May 30, 1975, the defendant sent a letter to plaintiffs acknowledging that it had violated the Act, at least with respect to one lot, and informing plaintiffs that they could, if they wished, rescind the sale and receive a refund of any payments made in accordance with the sales contract. Plaintiffs immediately notified defendant that they elected to rescind and wished a refund of their payments. Their letter concluded:

> "We expect you to contact us soon with the proper documents to be executed in order to reconvey said lot. . . ."

When the defendant did not promptly reply to the letter, plaintiffs telephoned the defendant on several occasions for the purpose of determining when their refund would be forthcoming. According to Annamarie Bomba's deposition, plaintiffs were told in July of 1975 that they would get their money back but that it would take time. This same assurance was made in subsequent phone calls throughout the course of 1975. Finally, in March of 1976, defendant's attorney wrote the Bombas a letter that indicated the defendant, in response to plaintiffs' request for rescission and a refund, would attempt to sell their lot and turn over the "net proceeds of sale" after deduction of various sales costs and commissions. Under the proposed agreement, the Bombas would release defendant from any and all claims in the event their lot was sold, even if the net proceeds of sale did not equal the amount of monies paid by plaintiffs pursuant to the sales

agreement with defendant. The Bombas then consulted an attorney, who brought the present suit on May 28, 1977.

II.

On appeal, the plaintiffs contend that the defendant is estopped by its conduct from relying on the statute of limitations contained in 15 U.S.C. § 1711. According to plaintiffs, by promising them a refund of their money, the defendant lulled them into a false sense of security that led them to refrain from bringing a timely suit. Thus, say plaintiffs, the defendant is estopped from relying on the statute of limitations defense under the principles set out in *Glus* v. *Brooklyn Eastern Dist. Terminal,* 359 U.S. 231, 79 S.Ct. 760, 3 L.Ed.2d 770 (1959).

Defendant responds that the explicit language of 15 U.S.C. § 1711 supports the district court's ruling that the statute of limitations contained therein constitutes an absolute bar to plaintiffs' cause of action, for the statute says in no uncertain terms that

> "In no event shall any [action to enforce a liability created by this Act] be brought by a purchaser more than three years after the sale or lease to such purchaser."

III.

In ruling that defendant was entitled to judgment as a matter of law because of the applicable statute of limitations, the district court took the view that the explicit language of 15 U.S.C. § 1711 foreclosed application of the doctrine of equitable estoppel in suits brought under the Interstate Land Sales Full Disclosure Act more than three years after the allegedly illegal sale. In essence, the district court ruled that the "In no event" wording of 15 U.S.C. § 1711 placed an absolute bar on the initiation of suit more than three years after the relevant sale, a limitations period that was not subject to equitable tolling.

Though we might well agree with the district court that the unequivocal language of 15 U.S.C. § 1711 presents an insurmountable barrier to the *tolling* of the three-year limitations

period contained therein, we cannot agree that the "In no event" terms in which the three-year limitations period is expressed forecloses possible application of the separate and distinct doctrine of equitable estoppel. Tolling, strictly speaking, is concerned with the point at which the limitations period begins to run and with the circumstances in which the running of the limitations period may be suspended. These are matters in large measure governed by the language of the statute of limitations itself, and thus it is not surprising that several district courts have held that the three-year limitations period of 15 U.S.C. § 1711 is not subject to being tolled. E. g., *Timmreck* v. *Munn,* 433 F.Supp. 396 (N.D.Ill.1977); *Husted* v. *AMREP Corp.,* 429 F.Supp. 298 (S.D.N.Y.1977); *Hester* v. *Hidden Valley Lakes, Inc.,* 404 F.Supp. 580 (N.D.Miss.1975). Equitable estoppel, however, is a different matter. It is not concerned with the running and suspension of the limitations period, but rather comes into play only after the limitations period has run and addresses itself to the circumstances in which a party will be estopped from asserting the statute of limitations as a defense to an admittedly untimely action because his conduct has induced another into forbearing suit within the applicable limitations period. Its application is wholly independent of the limitations period itself and takes its life, not from the language of the statute, but from the equitable principle that no man will be permitted to profit from his own wrongdoing in a court of justice. Thus, because equitable estoppel operates directly on the defendant without abrogating the running of the limitations period as provided by statute, it might apply no matter how unequivocally the applicable limitations period is expressed.

Glus v. *Brooklyn Eastern District Terminal,* 359 U.S. 231, 79 S.Ct. 760, 3 L.Ed.2d 770 (1959), is instructive in this regard. In that case, the Supreme Court was confronted with a federal statute of limitations that was just as unequivocal as the one before us now. Yet, notwithstanding the fact that the Federal Employers' Liability Act provided that

> "No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued,"

the Court held that the doctrine of equitable estoppel applied in suits brought under the statute. In so holding, the Court reasoned that the principle that no man may take advantage of his own wrongdoing was so deeply rooted in and integral to our jurisprudence that it should be implied in the interstices of every federal cause of action absent some affirmative indication that Congress expressly intended to exclude the application of equitable estoppel. *Id.* at 232-34, 79 S.Ct. 760. The Court found no such intent in even the unequivocal language of the statute, and in this respect *Glus* is controlling here.

In light of *Glus*, we hold that the "In no event" language of 15 U.S.C. § 1711 does not by its own terms bar the possible application of the doctrine of equitable estoppel to suits brought under the Interstate Land Sales Full Disclosure Act more than three years after the alleged sale.

Having held that the doctrine of equitable estoppel may apply in suits brought under the Interstate Land Sales Full Disclosure Act notwithstanding the terms of 15 U.S.C. § 1711, we turn to the question of whether plaintiffs have alleged sufficient facts to possibly warrant the doctrine's application in the particular circumstances of this case for, on a motion for summary judgment, "the burden is on the plaintiff to present facts . . . which, if true, would require a court as a matter of law to estop the defendant from asserting the statute of limitations." *Burke* v. *Gateway*, 441 F.2d 946, 948-49 (3d Cir. 1971). We believe the plaintiffs have met their burden.

In their depositions properly before the district court on defendant's motion for summary judgment, plaintiffs have stated that the defendant's promise to pay them a refund led them to defer seeking legal counsel and bringing suit on their claim. Though it is widely held that mere negotiations concerning a disputed claim, without more, is insufficient to warrant the application of equitable estoppel, *Melhorn v. AMREP Corp.*, 373 F.Supp. 1378, 1381 (M.D. Pa.1974), the cases are legion that a promise to pay a claim will estop a defendant from asserting the applicable statute of limitations if the plaintiff relied in good faith on defendant's promise in forbearing suit. E.g., *United States v. Reliance Ins. Co.*, 436 F.2d 1366, 1370 (10th Cir. 1971); *United States v. Fidelity & Cas. Co.*, 402 F.2d 893, 897 (4th Cir. 1968); *Demmert v. City of Klawock*, 199 F.2d 32, 34, 14 Alaska 20 (9th Cir. 1952); *United States v. Continental Cas. Co.*, 357 F.Supp. 795, 800 (E.D.La.1973). The oft-quoted rule applicable in such a situation is:

> "Estoppel arises where one, by his conduct, lulls another into a false security, and into a position he would not take only because of such conduct. Estoppel, in the event of a disputed claim, arises where one party by words, acts, and conduct led the other to believe that it would acknowledge and pay the claim, if, after investigation, the claim were found to be just, but when, after the time for suit had passed, breaks off negotiations and denies liability and refuses to pay." *Bartlett v. United States*, 272 F.2d 291, 296 (10th Cir. 1959).

Moreover, it is not necessary that the defendant intentionally mislead or deceive the plaintiff, or even intend by its conduct to induce delay. *United States v. Fidelity & Cas. Co.*, 402 F.2d 893, 898 (4th Cir. 1968); *Melhorn v. AMREP Corp.*, 373 F. Supp. 1378, 1381 (M.D.Pa.1974). Rather, all that is necessary for invocation of the doctrine of equitable estoppel is that the plaintiff reasonably rely on the defendant's conduct or representations in forbearing suit. *Id.*

Accordingly, as we believe that the materials properly before the district court raise a material issue of fact as to whether plaintiffs did in fact reasonably rely on defendant's promise of a refund in forbearing suit within the applicable limitations period, we reverse the district court's judgment and remand the case for further proceeding consistent with this opinion.

REVERSED AND REMANDED.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
219 South Dearborn Street
Chicago, Illinois 60604

Mr. Terrence C. Sheehy
1730 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20006

Mr. C. Frederick Leydig
One IBM Plaza, Suite 4600
Chicago, IL 60611

RE: Canadian Ace Brewing Co., Plaintiff-Appellant, vs. Anheuser-Busch, Inc., Defendant-Appellee. No. 78-1668

Gentlemen:

The court has directed the clerk to notify counsel for the defendant-appellee in the above-entitled appeal that an answer to the plaintiff-appellant's petition for rehearing *in banc*, limited to the issue of the applicability of the doctrine of equitable estoppel in light of *Bomba* v. *W. L. Belvidere, Inc.*, 579 F.2d 1067 (7th Cir. 1978), be filed on or before Thursday, April 5, 1979. Twenty-five (25) copies of that answer will be required.

Sincerely,

/s/ THOMAS F. STRUBBE
Thomas F. Strubbe (by jk)
Clerk

TFS/jk

cc: Mr. Allen H. Schultz, 221 N. LaSalle Street, Suite 1826, Chicago, IL 60601

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

April 18, 1979

Before

HON. ROBERT A. SPRECHER, *Circuit Judge*
HON. PHILIP W. TONE, *Circuit Judge*
HON. HARLINGTON WOOD, JR., *Circuit Judge*

CANADIAN ACE BREWING CO.,
Plaintiff-Appellant,

No. 78-1668 *vs.*

ANHEUSER-BUSCH, INCORPORATED,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 77 C 4198

Hubert L. Will,
Judge.

On consideration of the petition for rehearing by the Court in the above-entitled appeal, no member of the panel and no judge in regular active service having requested that a vote be taken on the suggestion for an *en banc* rehearing, and the panel having voted to deny a rehearing,

IT IS ORDERED that the petition for rehearing in the above-entitled appeal be, and the same is hereby DENIED.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-57

CANADIAN ACE BREWING CO.,
Petitioner,

v.

ANHEUSER-BUSCH, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-57

CANADIAN ACE BREWING CO.,
Petitioner,

v.

ANHEUSER-BUSCH, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

OPINIONS BELOW

The orders of the United States Court of Appeals for the Seventh Circuit affirming the judgment of the District Court (Pet. App. 1-2) and denying the Petition for Rehearing *In Banc* (Pet. App. 23) are not reported. The opinion of the United States District Court for the Northern District of Illinois on the dismissal of Petitioner's complaint (Pet. App. 3-10) is reported at 448 F. Supp. 769.

JURISDICTION

The order of the Court of Appeals affirming the judgment of the District Court was entered on March 6, 1979. A timely Petition for Rehearing *In Banc* was denied on April 18, 1979 (Pet. App. 23). The petition

for a writ of certiorari was filed on July 12, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the courts below correctly construed § 94 of the Illinois Business Corporation Act, Ill. Rev. Stat. ch. 32, § 157.94, in concluding that Petitioner, formerly an Illinois corporation and which was voluntarily dissolved on December 6, 1972, lacked capacity to sue as of the date of the filing of this action on November 11, 1977, notwithstanding allegations of fraudulent concealment and/or equitable estoppel contained in Petitioner's complaint.

STATUTE INVOLVED

Section 94 of the Illinois Business Corporation Act, as amended, Ill. Rev. Stat. ch. 32, § 157.94, provides:

> The dissolution of a corporation either (1) by the issuance of a certificate of dissolution by the Secretary of State, or (2) by the order of the court when the court has not liquidated the assets and business of the corporation, or (3) by expiration of its period of duration, shall not take away or impair any remedy available to or against such corporation, its directors, or shareholders, for any right or claim existing, or any liability incurred, prior to such dissolution if action or other proceeding thereon is commenced within two years after the date of such dissolution. Any such action or proceeding by or against the corporation may be prosecuted or defended by the corporation in its corporate name.

STATEMENT OF THE CASE

Petitioner Canadian Ace Brewing Company filed this antitrust action against Respondent Anheuser-Busch, Inc. on November 11, 1977, nearly five years after Petitioner's voluntary dissolution under Illinois corporate law on December 6, 1972. The complaint alleged violations of §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, and § 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a), which were claimed to have commenced at least as early as 1964. The jurisdiction of the District Court was invoked under § 4 of the Clayton Act, 15 U.S.C. § 15.

Respondent moved to dismiss the complaint on the ground that as a matter of Illinois corporate law, a dissolved Illinois corporation lacks capacity to institute any action more than two years after its dissolution. Illinois Business Corporation Act, § 94, Ill. Rev. Stat. ch. 32, § 157.94. In opposition to Respondent's motion, Petitioner contended that Respondent's alleged "fraudulent concealment" of Petitioner's alleged claims "tolled" the two-year post-dissolution period during which a dissolved Illinois corporation has capacity to sue.

The District Court, sitting in Illinois, dismissed the complaint, holding that under the Illinois statute, a dissolved Illinois corporation has no capacity to institute any action more than two years after its dissolution. The District Court held further that Petitioner's self-styled allegations of "fraudulent concealment" could not, in light of the plain language and purposes of § 94, "toll" the two-year post-dissolution period during which Petitioner had capacity to sue (Pet. App. 3-10).*

---

* Both the District Court and the Court of Appeals properly took the allegations of Petitioner's complaint as true for the purpose of ruling on Respondent's motion to dismiss. Respondent, of course, has no objection to that procedure. We do take strong exception, however, to Petitioner's reckless use of the term "admitted" and related characterizations with respect to the status of the allegations of the complaint. Respondent has not admitted, does not admit and, indeed, categorically denies both Petitioner's antitrust claims and its charges of fraudulent conduct.

On appeal, Petitioner for the first time contended that "equitable estoppel," rather than "fraudulent concealment," provided the basis for avoiding the capacity bar of the Illinois statute. Notwithstanding Petitioner's contentions, after full briefing and oral argument a unanimous panel of the Court of Appeals affirmed the District Court's dismissal of Petitioner's complaint (Pet. App. 1-2).

Petitioner reasserted its "equitable estoppel" argument on petition for rehearing *in banc*. In answer to the petition, Respondent argued that the alleged estoppel issue was not properly before the Court because of Petitioner's failure to raise it in the District Court; that even if not untimely, Petitioner had failed to plead an equitable estoppel; and that, in any event, the same reasoning which required rejection of Petitioner's "fraudulent concealment" argument required rejection of its belated "estoppel" theory as well. On April 18, 1979, the petition for rehearing *in banc* was denied, the panel having voted to deny rehearing and no judge of the Court of Appeals having requested a vote on the suggestion for rehearing *in banc* (Pet. App. 23).

ARGUMENT

The petition presents no question warranting review by this Court. As Petitioner concedes (Pet. at 3, n. 2), this case involves solely a question of Illinois state law, the correct construction of § 94 of the Illinois Business Corporation Act. Petitioner's arguments were fully heard by the District Court, sitting in Illinois, which ruled that Petitioner's proposed construction of the Illinois statute was both contrary to its plain language and would lead to a result inimical to its purposes. The members of the three-judge panel of the Court of Appeals (Sprecher, Tone and Wood, JJ.), all of whom practiced in Illinois and two of whom sat in the District Court in Illinois

prior to their appointment to the Seventh Circuit, unanimously agreed with the conclusion of the District Court and affirmed the dismissal of Petitioner's complaint. Under these circumstances, the Court should "follow [its] general policy and leave undisturbed this Court of Appeals holding on a question of state law." *Estate of Spiegel* v. *Commissioner*, 335 U.S. 701, 708 (1949).

In any event, the decision below is fully consistent with the decisions of the Illinois courts and of this Court regarding a dissolved corporation's capacity to sue. As stated in *People* v. *Parker*, 30 Ill. 2d 486, 197 N.E.2d 30 (1964):

> There is no dispute that by the common law doctrine of the status of a corporation after its dissolution for any cause, the corporation has no legal existence, and the real estate held by the dissolved corporation reverts to the grantors or donors, and the personal property escheats to the king, and that no right of action can be maintained to enforce a claim against the defunct corporation. In the United States, however, this common law doctrine has been so modified that the property of a dissolved corporation is to be used for the benefit of the creditors and stockholders after dissolution, and generally, by a saving clause, stockholders or creditors may maintain an action for that purpose, *and in order to maintain an action it must be filed within the time fixed for such purpose.* (197 N.E.2d at 31, quoting *Consolidated Coal Co.* v. *Flynn Coal Co.*, 274 Ill. App. 405, 411 (1934); emphasis supplied.)

Accord, *Markus* v. *Chicago Title & Trust Co.*, 373 Ill. 557, 27 N.E.2d 463 (1940); *Koepke* v. *First National Bank of DeKalb*, 5 Ill. App. 3d 799, 284 N.E.2d 671 (1972); *O'Neill* v. *Continental Illinois Co.*, 341 Ill. App. 119, 93 N.E.2d 160 (1950); *Ruthfield* v. *Louisville Fuel Co.*, 312 Ill. App. 415, 38 N.E.2d 832 (1942); *Sarelas*

v. *McCue & Co.*, 291 Ill. App. 540, 10 N.E.2d 700 (1937); *Consolidated Coal Co.* v. *Flynn Coal Co.*, 274 Ill. App. 405 (1934); *Dukes* v. *Harrison & Reidy*, 270 Ill. App. 372 (1933).

Similarly, as this Court held in construing predecessor statutes identical in effect to the present § 94 insofar as relevant here:

> The decisions of this court are all to the effect that a private corporation in this country can exist only under the express law of the state or sovereignty by which it was created. Its dissolution puts an end to its existence, the result of which may be likened to the death of a natural person. There must be some statutory authority for the prolongation of its life, even for litigation purposes.
>
> * * * *
>
> It is plain enough, under the Illinois statute, that after the expiration of two years from the date of its dissolution, respondent was without legal capacity to initiate any legal proceeding . . . (*Chicago Title Trust Co.* v. *Forty-One Thirty-Six Wilcox Building Corp.*, 302 U.S. 120, 124-26 (1937).

Furthermore, there is no conflict between the decision below and the decisions in *Glus* v. *Brooklyn Eastern District Terminal*, 359 U.S. 231 (1959), and *Bomba* v. *W. L. Belvidere, Inc.*, 579 F.2d 1067 (7th Cir. 1978), on which Petitioner relies. Neither of those cases involved the capacity of a dissolved corporation. In each case, the issue was whether equitable estoppel could apply (based on factual allegations far different than those involved here) with respect to a so-called "substantive" statute of limitations. Even if § 94 were a statute of limitations, which it is not, *People* v. *Parker*, *supra*, 197 N.E.2d at 31, *Glus* and *Bomba* would be inapplicable here because in neither case was the court required to

harmonize the application of an estoppel with the purposes underlying a corporate survival statute like § 94.

The decisions construing such statutes leave no room for doubt that application of an estoppel theory to allow a suit by a dissolved corporation beyond the specified point in time would be contrary to their purpose. The courts have repeatedly recognized that corporate survival statutes are based on the need for "a definite point in time at which the existence of a corporation and the transaction of its business are terminated." *Johnson* v. *RAC Corp.*, 491 F.2d 510, 512 n. 3 (4th Cir. 1974); *Litts* v. *Refrigerated Transport Co.*, 375 F. Supp. 675, 677 (M.D. Pa. 1973); *Bishop* v. *Schield Bantam Co.*, 293 F. Supp. 94, 96 (N.D. Iowa 1968). Thus, as stated in *Gordon* v. *Loew's, Inc.*, 147 F. Supp. 398, 408 (D.N.J. 1956), *aff'd on other issues*, 247 F.2d 451 (3d Cir. 1957), § 94 is

> a statement of the public policy of the State of Illinois that remedies available to a corporation or its shareholders prior to its dissolution may be enforced only within two years after such dissolution.

See also Galter v. *Federal Trade Comm'n*, 186 F.2d 810, 816 (7th Cir.), *cert. denied*, 342 U.S. 818 (1951) (recognizing public policy foundation of limited extension of corporate life embodied in § 94).

Neither in its Petition nor at any other point in this litigation has Petitioner even attempted to reconcile its proposed construction of § 94 with this statutory purpose. The reason, quite clearly, is that no such reconciliation is possible.

CONCLUSION

For the foregoing reasons, Respondent respectfully submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-57

CANADIAN ACE BREWING CO.,
Petitioner,

vs.

ANHEUSER-BUSCH, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

PRELIMINARY STATEMENT

Respondent's brief in opposition, emphasizes the need for this Court to review this federal antitrust suit.

Respondent did not take issue with Petitioner's contentions that:

(1) The federal antitrust laws are the economic bulwark of a democratic society (Pet., p. 9);

(2) Congress was impelled to pass the Sherman Act because it was concerned with the growing concentration of economic power in the hands of the few, and the rapidly diminishing freedoms of economic opportunity for the small businessman (*Id.*, p. 9);

(3) There were 756 breweries in 1934, and currently there are only 43 breweries (*Id.*, p. 9).

Thus, Respondent's admitted acts of fraudulent conduct, in the context of this important federal economic policy, in our democratic society, are especially unconscionable.

RESPONDENT'S ARGUMENTS AND PETITIONER'S REPLIES

Argument No. 1

Respondent argues:

> On appeal, Petitioner for the first time contended that "equitable estoppel," rather than "fraudulent concealment," provided the basis for avoiding the capacity bar of the Illinois statute. (Brf., p. 4.)

Reply: Respondent's statement has no legal significance. It is the "fraudulent concealment" which creates an "equitable estoppel." Pomeroy's Equity Jurisdiction, Fifth Edition (Symons), Vol. III (1941), § 808, p. 206. Thus, Respondent's contention that there is a legal distinction between "equitable estoppel" and "fraudulent concealment" is without merit.

Argument No. 2

Respondent argues:

> Petitioner reasserted its "equitable estoppel" argument on petition for rehearing in banc. In answer to the petition, Respondent argued that the alleged estoppel issue was not properly before the Court because of Petitioner's failure to raise it in the District Court; that even if not untimely, Petitioner had failed to plead an equitable estoppel. (Brf., p. 4.)

Reply: (a) Respondent's statement that Petitioner failed to raise the alleged estoppel issue in the District Court belies the record. In Petitioner's answering memorandum, to Respondent's memorandum, in support of its motion to dismiss, at the trial court level, Petitioner argued "that no man may take advantage of his own wrong." *Glus* v. *Brooklyn Eastern District Terminal*, 359 U. S. 231, 3 L. Ed. 2d 770 (1959).

(b) Respondent's statement that "Petitioner had failed to plead an equitable estoppel" is baseless. Paragraph 18(i) of the complaint is addressed to Respondent's acts of "Fraudulent Concealment"; paragraph 18(iii) is addressed to Respondent's acts of "Affirmative Fraudulent Misrepresentation"; and paragraph 18(vi) is addressed to Respondent's acts of "Fraudulent Inducement." In paragraph 22(a)(b)(c) (Relief Requested), Petitioner pleaded that the court preclude Respondent from pleading § 94 of the Illinois Business Corporation Act, Ill. Rev. Stat. ch. 32, § 157.94 (hereinafter "§ 94").

Argument No. 3

Respondent cites numerous cases for the general rule of law, that after the expiration of the two-year period from the date of its dissolution, a dissolved corporation is foreclosed from initiating any legal proceedings. (Brf., pp. 5-7.)

Reply: Petitioner agrees with this general rule of law. However, in none of the cases cited by Respondent was it necessary to consider, nor did the parties urge, the existence of any facts suggesting the need to apply the doctrine of equitable estoppel. Because of Respondent's admitted* acts of fraudulent conduct, the District and Circuit Courts erred in failing to "preclude" Respondent from asserting its rights, under § 94, against Petitioner. *Pomeroy, supra,* § 804, p. 189. Respondent should not be permitted to frustrate and evade the federal antitrust laws, which are designed to prevent the concentration of economic power in the hands of the few.

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* In its footnote on page 3, Respondent agrees that its motion to dismiss, admits as true, Petitioner's allegations of Respondent's fraudulent conduct, and then proceeds to deny them. Respondent cannot have it both ways. At this stage of the litigation, Respondent's denial is of no consequence, and cannot contradict the effect of its motion to dismiss.

Argument No. 4

Respondent argues:

> Furthermore, there is no conflict between the decision below and the decisions in *Glus* v. *Brooklyn Eastern District Terminal*, 359 U.S. 231 (1959), and *Bomba* v. *W. L. Belvidere, Inc.*, 579 F.2d 1067 (7th Cir. 1978), on which Petitioner relies. Neither of those cases involved the capacity of a dissolved corporation. In each case, the issue was whether equitable estoppel could apply (based on factual allegations far different than those involved here) with respect to a so-called "substantive" statutes of limitations. (Brf., p. 6.)

Reply: Originally the doctrine of equitable estoppel was only applied to "traditional" statutes of limitations, but not to "substantive" statutes of limitations (those statutes creating a new cause of action unknown to the common law, and limiting time for commencing suit thereon). In *Glus*, this court followed the ruling of many circuits, and declared that equitable estoppel shall apply to "substantive" statutes of limitations. In *Sarelas* v. *McCue & Co.*, 291 Ill. App. 540, 10 N. E. 2d 700, 702, the court characterized a statute of "survival," as a "conditional limitation" statute. The distinction drawn by the District and Circuit Courts, between time limitations set forth in "traditional" statutes of limitation and those contained in "survival" statutes, is no more meaningful than the now rejected distinction between "procedural" and "substantive" statutes. *Glus*, should be controlling in every instance where "the maxim that no man may take advantage of his own wrong," is applicable. Thus, equitable estoppel, should not only apply to "traditional" and "substantive" statutes of limitations, but also to a "conditional limitation" or "survival" statute.

Argument No. 5

Respondent argues:

> Even if § 94 were a statute of limitations, which it is not, *People* v. *Parker, supra*, 197 N.E.2d at 31, *Glus* and *Bomba* would be inapplicable here because in neither case was the court required to harmonize the application of an estoppel with the purposes underlying a corporate survival statute like § 94. (Brf., pp. 6-7.)

Reply: Respondent contends that the language of § 94 is absolute and unequivocal, and thus, the Court is foreclosed from applying the separate and distinct doctrine of equitable estoppel. The District and Circuit Courts agreed. This Court in *Glus*, and the Circuit Court in *Bomba*, ruled that although the statute involved was absolute and unequivocal, it did not foreclose the application of the separate and distinct doctrine of equitable estoppel. Thus, the District and Circuit Courts erred in refusing to apply the separate and distinct doctrine of equitable estoppel to § 94, in accordance with this Court's ruling in *Glus*, and the Circuit Court's ruling in *Bomba*.

Argument No. 6

Respondent argues:

> that corporate survival statutes are based on the need for a "definite point in time at which the existence of a corporation and the transaction of its business are terminated."
>
> * * * * *
>
> Neither in its Petition nor at any other point in this litigation has Petitioner even attempted to reconcile its proposed construction of § 94 with this statutory purpose. The reason, quite clearly, is that no such reconciliation is possible. (Brf., p. 7.)

Reply: Respondent contends that when attempting to "reconcile" § 94, with the doctrine of equitable estoppel, in this antitrust suit, § 94 must prevail. This contention is incredible. It is

frivolous for Respondent to contend that the purposes of § 94 could be paramount to "justice and good conscience." (*Glus.*) On the contrary, the courts have ruled that "justice and good conscience" will "preclude" a party "from asserting rights" which might otherwise exist, "either of property, of contract, or of remedy." (*Pomeroy, supra,* § 804, p. 189.)

Respondent's admitted acts of fraudulent conduct in order to (1) "suppress commercial competition," (2) "fix prices," (3) "restrict production," and (4) "crush small independent traders," (Pet. p. 9), should not be sanctioned by the federal courts; and the doctrine of equitable estoppel should be applicable to § 94.

CONCLUSION

For the foregoing reasons, as well as those stated in the Petition, Canadian Ace Brewing Co. respectfully prays that its petition for a writ of certiorari be granted.

Respectfully submitted,

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